NEW YORK LAW SCHOOL

NYLS Law Review
Vols. 22-63 (1976-2019)

Volume 47
Issue 2 *VOLUME 47, NUMBERS 2-3, FALL 2003*

Article 23

January 2003

NEW YORK COURT OF APPEALS CASE COMPILATIONS: CHURCH V. CALLANAN INDUSTRIES, INC.

Zoe Feinberg

CHURCH V. CALLANAN INDUSTRIES, INC.[1]

(decided November 19, 2002)

I. SYNOPSIS

The New York Court of Appeals affirmed the appellate division's order granting summary judgment for the defendant subcontractor San Juan, and held that a subcontractor's contractual obligations to a general contractor did not create a duty of care to third parties, and therefore the subcontractor cannot be held liable in tort for a breach of those obligations.[2] However, the court identified three exceptions to this general rule in which a duty of care to non-contracting third parties may arise out of a contractual obligation.[3] The first exception allows a third party to recover when the promisor creates an unreasonable risk of harm to others, or increases that risk.[4] The second exception imposes liability where a plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation.[5] Lastly, the third exception imposes liability "where the contracting party has entirely displaced the other party's duty to maintain the premises safely."[6]

II. BACKGROUND

On December 26, 1992, plaintiff Ned Church, age nine, was rendered quadriplegic when his mother, Barbara Church, the driver of the car in which he was a rear seat occupant, fell asleep at the wheel.[7] The vehicle veered off a New York State Thruway, narrowly missed the northern end of a guiderail, plunged down an em-

1. 99 N.Y.2d 104 (2002).
2. *Id.* at 110.
3. *Id.* at 111.
4. *Id.*
5. *Id.*
6. *Church*, 99 N.Y.2d at 113(citing Espinal v. Melville Snow Contrs., Inc., 98 N.Y.2d 136, 140 (2002); Palka v. Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579, 589 (1994)).
7. *Church*, 99 N.Y.2d at 109.

bankment and crashed into a ditch.[8] The site where the vehicle veered off the highway was within a 22-mile resurfacing and safety-improving project, which was completed in 1986 pursuant to an agreement between the Thruway Authority and Callanan Industries Inc., a general contractor.[9]

The agreement between the Thruway Authority and Callanan provided for the removal of 275 feet of existing guiderail and its replacement of a longer, 312.5 feet, guiderail system.[10] The Thruway Authority also contracted with Clough, Harbour & Associates, a construction engineering firm, to inspect and supervise Callanan's compliance with the contract.[11] Under the contract between the Thruway Authority and Callanan, Clough's recommendation was required before final acceptance of Callanan's work.[12] Subsequently, Callanan entered into a subcontract with defendant, San Juan Construction and Sales Company, for the installation of the guiderail system.[13] The subcontract incorporated the general contract between the Thruway Authority and Callanan by reference.[14] Although the contract specified for the installation of 312.5 feet of guiderail, defendant San Juan only installed 212.5 feet of guiderail at that location.[15]

Suit was brought on behalf of infant plaintiff, Ned Church, against Callanan, San Juan, and Clough Harbour in the New York Supreme Court. The plaintiffs' stated causes of action were for negligence—the negligent failure of San Juan to complete the full 312.5 feet of new guiderailing and Clough Harbour's negligent inspection and approval of the installation despite it's noncompletion.[16]

Callanan and San Juan moved for summary judgment dismissing the complaint, arguing in part that as contracting parties

8. *Church*, 99 N.Y.2d at 109.
9. *Id.* at 110.
10. *Id.*
11. *Id.*
12. *Church*, 99 N.Y.2d at 110.
13. *Id.*at 109.
14. *Id.*
15. *Id.*; Church v. Callanan Industries Inc., 729 N.Y.S.2d 545, 546 (N.Y. App. Div. 2001).
16. *Church*, 99 N.Y.2d at 109-10.

they owed no duty to the plaintiffs.[17] The plaintiffs responded by arguing that both defendants undertook a duty to perform safety improvements and were liable for their "negligent performance of these improvements [which] directly caused Ned Church's injuries."[18] The supreme court denied the defendants' motion for summary judgment.[19]

On appeal from the supreme court, the appellate d§ivision, in a three to two decision, reversed and granted summary judgment to San Juan, determining that San Juan did not owe the plaintiffs a duty of care.[20] In coming to this conclusion, the appellate division analyzed several existing authorities.[21] First, the court noted that an important consideration mitigating against third party liability is the fact that the defect was readily observable.[22] Second, courts will not impose liability in "favor of a class of plaintiffs that either encompasses so many or is so remote as to exceed 'controllable limits.'"[23] Third, there must be a reasonable proximity between the performance of the contractual obligation and the resulting injury.[24] Lastly, the court of appeals has continuously held that an injured non-contracting plaintiff must show reliance on the continued performance of a contractual obligation, and that the failure to fulfill that obligation resulted in "positively or actively" causing the injury, as opposed to merely withholding a benefit.[25]

In applying these considerations, the appellate division concluded that imposing liability on San Juan would expand "the zone of duty beyond acceptable public policy limits."[26] The court noted that the hazard, the missing guardrail, was "readily observable at all

17. *Id.* at 110.

18. *Church*, 99 N.Y.2d at 110.

19. *Id.*

20. Church v. Callanan Industries Inc., 729 N.Y.S.2d 545, 551 (N.Y. App. Div. 2001); Church v. Callanan Industries Inc., 99 N.Y.2d 104, 110 (2002). (noting that during the pendency of the appeals, plaintiffs settled their suits against Callanan and Clough Harbour).

21. *Church*, 729 N.Y.S.2d at 548-49.

22. *Id.*

23. *Id* at 549. (citing Strauss v. Belle Realty Co., 65 N.Y.2d 399, 405 (1985); Waters v. New York City Hous. Auth., 69 N.Y.2d 225, 230 (1987)).

24. *Id.*

25. *Church*, 729 N.Y.S.2d at 549(citing Palka v. Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579, 587 (1994)).

26. *Id.* at 546.

times," including "when Clough Harbour inspected and approved the work, when the State accepted and paid for the work and in the intervening years when the length and location of the guardrail was plainly visible to passing State maintenance and repair crews, State engineers and the traveling public."[27] The court also noted that the "class of potential plaintiffs would be virtually limitless," because it would consist of all motorists that use that section of the thruway.[28] The plaintiffs appealed to the court of appeals as of right, pursuant to CPLR 5601(d), on the basis of the two-Justice dissent at the appellate division.[29]

III. DISCUSSION

The court of appeals began its discussion with a brief statement of the "threshold and dispositive" question on this appeal: whether San Juan owed the infant plaintiff a duty of care.[30] The court stated the general rule that "ordinarily, breach of a contractual obligation will not be sufficient in and of itself to impose tort liability to non-contracting third parties upon the promisor."[31] The court of appeals further stated that an injured party from a breach of a contractual obligation is limited to contractual remedies.[32]

Nevertheless, the court identified three exceptions to the general rule, in which a duty of care will exist as to non-contracting third parties.[33] In such cases, the promisor will be subject to tort liability.[34] The first exception allows a third party to recover when the promisor creates an unreasonable risk of harm to others, or increases that risk.[35] The second exception imposes liability where a plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obliga-

27. *Church,* 729 N.Y.S.2d at 550.

28. *Id.*

29. N.Y. CIV. PRAC. RULES & PROC., §5601(d) (McKinneys 1995); *Church,* 99 N.Y.2d at 110.

30. *Church,* 99 N.Y.2d at 110.

31. *Id.* at 111. (citing H.R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160 (1928; Eaves Brooks Costume Co. v. Y.B.H. Realty Corp., 76 N.Y.2d 220, 226 (1990).

32. *Id.* (citing PROSSER & KEATON, TORTS, §92, at 656, 5th ed (1984)).

33. *Id.* at 111.

34. *Id.*

35. *Id.*

tion.[36] Lastly, the third exception imposes liability "where the contracting party has entirely displaced the other party's duty to maintain the premises safely."[37]

The court of appeals held that the plaintiffs failed to qualify under any of the three stated exceptions.[38] As to the first exception, there was no evidence in the record that San Juan's failure to perform it's contractual obligations created or increased the risk of the car to veer from the thruway, beyond the risk that existed before any contract was made with San Juan.[39] The court drew a distinction between breach of contract cases where a party has created or increased the risk, and cases in which a party is "merely withholding a benefit", and classified San Juan in the latter category.[40] San Juan's failure to install the length of the guiderail required by the contract resulted in merely neglecting to make the highway more safe, rather than making the highway less safe, than it was prior to the safety improvement project.[41]

The case also did not fall within the second recognized exception, in which liability is imposed where a plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation.[42] The court concisely stated that it could not be contended that "the tragic loss of control of the car occurred because the driver 'detrimentally relied on the continued performance of [San Juan contractual] duties' when she failed to remain awake and alert at the wheel."[43]

The case also did not fall within the third recognized exception, which imposes liability "where the contracting party has entirely displaced the other party's duty to maintain the premises safely."[44] Under the contractual framework, the Thruway Author-

36. *Church*, 99 N.Y.2d at 111-12.

37. *Church*, 99 N.Y.2d at 112(citing Espinal v. Melville Snow Contrs., Inc., 98 N.Y.2d 136, 140 (2002); Palka v. Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579, 589 (1994)).

38. *Church*, 99 N.Y.2d at 112.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Church*, 99 N.Y.2d at 112.

43. *Id.*

44. *Id.* (citing Espinal v. Melville Snow Contrs., Inc., 98 N.Y.2d 136, 140 (2002); Palka v. Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579, 589 (1994)).

ity, not San Juan, assumed the duty to oversee, insure, and finally inspect the installation of the required length of the guiderailing.[45]

In concluding that the third exception was inapplicable to San Juan, the court of appeals discussed two cases, *Palka v. Servicemaster Mgt. Servs. Corp.*[46] and *Espinal v. Melville Snow Contractors*, Inc.[47], which are instructive on the issue of imposing tort liability in breach of contract cases.[48] Both cases support the proposition that "tort liability for breach of contract will not be imposed merely because there is some safety-related aspect to the unfulfilled contractual obligation."[49]

In *Palka*, the court of appeals imposed third-party liability on a maintenance company with whom a hospital had a service contract. The court said the contract was "comprehensive and exclusive" as to preventative maintenance, inspection, and repair.[50] Therefore, because the defendant undertook all aspects of safety inspection and repair, the defendant ought to foresee the likelihood of harm to third persons as a result of the hospital's reasonable reliance on the defendant to discover or repair dangerous conditions.[51]

The court of appeals distinguished *Espinal*,in which the court declined to impose tort liability on a snow removal contractor.[52] The court stated that absent evidence that Melville Snow Contractors, Inc. created or aggravated a dangerous condition, the landowner at all times retained its duty to inspect and safely maintain its premises.[53]

The court of appeals likened San Juan with Espinal.[54] Unlike the defendant in *Palka*, San Juan did not assume all of the safety obligations in relation to the guiderail system.[55] The Thruway Authority entered a separate contract with Clough Harbour to provide for inspection and supervision of the guiderail project, which in-

45. *Church*, 99 N.Y.2d at 114.
46. Palka v. Servicemaster Mgt. Servs. Corp., 83 N.Y.2d 579 (1994).
47. Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136 (2002).
48. *Church*, 99 N.Y. 2d at 112.
49. *Church*, 99 N.Y. 2d at 112.
50. *Id.* at 113.
51. *Id.*
52. Espinal v. Melville Snow Contractors, Inc., 98 N.Y.2d 136 (2002).
53. *Id.* at 141; *Church*, 99 N.Y.2d at 113.
54. *Church*, 99 N.Y.2d at 113.
55. *Id.*

cluded San Juan's compliance with the provisions providing for guiderail length.[56] Therefore, it was evident that San Juan never assumed the Thurway Authority's tort duty to supervise and guarantee the installation of the safe length of the guiderailing system.[57]

IV. CONCLUSION

In *Church v. Callanan Industries, Inc.*, the New York Court of Appeals held that defendant San Juan's breach of its contractual obligations did not render it liable in tort to non-contracting third party plaintiffs.[58] The court also held that the three recognized exceptions that do impose tort liability on a contracting party for failure to complete its contractual obligations were not applicable to San Juan.[59] Accordingly, the New York Court of Appeals affirmed the judgment of the appellate division granting defendant San Juan summary judgment.[60]

Zoë Feinberg

56. *Church*, 99 N.Y.2d at 113.
57. *Id.* at 114.
58. *Id.*
59. *Id.* at 112.
60. *Id.* at 114.